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No. 84-281 (3)

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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21pp

QUESTION PRESENTED

Whether the United States of Appeals for the Seventh Circuit erred in affirming the dismissal of the petitioners' second amended complaint for failure to state a claim upon which relief could be granted under 42 U.S.C. sec. 1983.

STATEMENT REQUIRED BY RULE 28.1

The Respondent, ITT Consumer Financial Corporation, is a Delaware corporation. Its parent corporation is ITT Financial Corporation, also a Delaware corporation. ITT Consumer Financial Corporation has no subsidiaries. The respondent, Aetna Finance Company (Thorp Finance Corporation) is a Delaware corporation. Its parent corporation is ITT Financial Corporation, also a Delaware corporation. Aetna Finance Company (Thorp Finance Corporation) has no subsidiaries. The affiliates of the Respondents, ITT Consumer Financial Corporation and Aetna Finance Company (Thorp Finance Corporation) are ITT Small Business Finance Corporation, Aetna Finance Company, a Wyoming corporation; Aetna Industrial Loan Company; Thorp Credit Inc.; Thorp Credit Company of Kentucky; Thorp Sales Corporation; Thorp Consumer Discount Company; Thorp Loan and Thirft Company; ITT Financial Services Corporation; Newport Balboa Savings & Loan Association;

Newport Balboa Financial Corporation; ITT Financial Management Company; ITT Financial Securities, Inc.; Computer & Equipment Leasing Corporation; ITT Business Services Corporation; ITT Industrial Credit Company; ITT Industrial Credit Company of Iowa; ITT Industrial Credit Company of Tennessee; ITT Capital Resources Group, Inc.; ITT Commercial Finance Corp.; ITT Commercial Finance Limited; Lyndon Insurance Company; ITT Lyndon Life Insurance Company; ITT Lyndon Property Insurance Company; Lyndon International, Ltd.; ITT Financial N.V.; Island Finance N.V.; Island Finance (Aruba) N.V.; Island Finance (St. Maarten) N.V.; Island Finance Corporation; Island Finance Corporation of Adjuntas; Island Finance Corporation of Aguada; Island Finance Corporation of Aguadilla; Island Finance Corporation of Aibonito; Island Finance Corporation of Arecibo; Island Finance Corporation of Bayamon; Island Finance Corporation of Bayamon No. II; Island Finance Corporation of Bayamon

#3; Island Finance Corporation of Caguas; Island Finance Corporation of Caguas II; Island Finance Corporation of Caparra; Island Finance Corporation of Caroline; Island Finance Corporation of Cayey; Island Finance Corporation of Ciales; Island Finance Corporation of Cidra; Island Finance Corporation of Coamo; Island Finance Corporation of Comerio; Island Finance Corporation of Corozal; Island Finance Corporation of Dorado; Island Finance Corporation of Fajardo; Island Finance Corporation of Guayama; Island Finance Corporation of Guayanilla; Island Finance Corporation of Hato Rey; Island Finance Corporation of Juana Diaz; Island Finance Corporation of Lau Piedras; Island Finance Corporation of Levittown; Island Finance Corporation of Manati; Island Finance Corporation of Mayaguez; Island Finance Corporation of Mayaguez II; Island Finance Corporation of Naranjito; Island Finance Corporation of Ponce; Island Finance Corporation of Ponce No. II; Island Finance Corporation of Ponce No. III; Island Finance Corporation of

Puerto Nuevo; Island Finance Corporation of Rio Grande; Island Finance Corporation of Rio Piedras; Island Finance Corporation of San German; Island Finance Corporation of San Juan; Island Finance Corporation of San Juan #2; Island Finance Corporation of San Lorenzo; Island Finance Corporation of San Sebastian; Island Finance Corporation of Utuado; Island Finance Corporation of Vega Alta; Island Finance Corporation of Vega Baja; Island Finance Corporation of Yabucoa; Island Finance Corporation of Yauco.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-281

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

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CITATIONS TO OPINIONS AND JUDGMENTS

All relevent opinions and judgments of the Courts below have been reproduced in the Appendices of the Petitioners and the Respondents.

APPLICABLE STATUTES

Rule 12(b), Fed. R. Civ. P:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making

any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

The petitioners first brought this action in the Western District of Wisconsin as a diversity case, claiming both fraud and abuse of process in obtaining a state court judgment. Respondent moved to dismiss the action for lack of subject matter jurisdiction, since all of the petitioners were Wisconsin citizens, and two of the respondents, Whyte and Hirschboeck, S.C. and Edward J. Heiser, Jr., were also Wisconsin citizens. (Motion to Dismiss Complaint, Resp. App. p. 2a) The petitioners then filed an Amended Complaint in which they attempted to establish jurisdiction by asserting a federal claim. To do so they added a one paragraph "Third Cause of Action", which did nothing more than incorporate the allegations of the two original counts and then make the conclusory allegation that the respondents "jointly and severally, acting under color of law, did wrongfully deprive the plaintiffs of their rights of property and privileges secured by

the constitution and laws under 42 U.S.C. Sec. 1983." (Amended Complaint, Pet. App. p. 12a)

The respondents moved to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted, and for lack of subject matter jurisdiction. (Motions to Dismiss, Resp. App. p. 2a) The Court granted the motions, and a judgment of dismissal was entered on February 24, 1983. (Judgment, Resp. App. p. 4a)

The petitioners then requested reconsideration of the dismissal, particularly of the claim for violation of § 1983, and the Court granted a hearing. Just before the hearing the petitioners sought leave to amend their Complaint a second time to add, as paragraph 28, an allegation that the defendants willfully acted jointly with the Circuit Court of Portage County to deprive the petitioners of property without due process of law. The alleged due process violation was obtaining summary judgment, which denied the petitioners a jury trial. (Motion to

Amend Complaint, Pet. App. p. 21a).

On March 24, 1983, after a hearing, the District Court vacated the February 24, 1983, judgment of dismissal, allowed the petitioners to amend their Complaint a second time, and then granted the respondents motions to dismiss the Second Amended Complaint. A judgment implementing that order was entered on April 8, 1983. (Judgment, Resp. App., p. 5a).

The petitioners filed an appeal in the United States Court of Appeals for the Seventh Circuit. An unpublished opinion affirming the dismissal was rendered on May 23, 1984. (Opinion, Pet. App., p. 2a). A petition for writ of certiorari was filed in the United States Supreme Court by the petitioners herein on August 15, 1984.

SUMMARY OF ARGUMENT

No special and important reasons exist for granting the petition for writ of certiorari under Rule 17.1(a) S. Ct: R. Civ. P. The Court of Appeals did not depart from the accepted and usual course of proceedings, nor did it decide an important question of federal law, in affirming the dismissal of petitioners' second amended complaint pursuant to Rule (b)(6), Fed. R. Civ. P.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THE REASON THAT IT FAILS TO SET FORTH SPECIAL AND IMPORTANT REASONS WITHIN THE PURVIEW OF RULE 17.1(a), S. Ct. R. Civ. P.

Rule 17.1(a) provides that review on a writ of certiorari is not a matter of right, but will be granted only where there are special and important reasons therefor. Jurisdiction to bringing up cases on certiorari from the federal courts of appeal was given for two purposes: first, to secure uniformity of decision between the courts of appeal and secondly, to bring up cases involving questions of great importance which it is in the public interest to have decided. The jurisdiction was not conferred merely to give the defeated party in the court of appeals another hearing. Magnum Import Co. v. De Spoturno Coty, 262 U.S. 159, 163, 75 S. Ct. 614, 99 L. Ed. 897,

924 (1955). However important a case may be to the applicant, certiorari will not be granted where the question is not one of gravity and general importance. Fields v. United States, 205 U.S. 292, 296 27 S. Ct. 543, 51 L. Ed. 807, 810 (1907).

In the instant case, petitioners allege that they lost their 1980 potato crop when a state court judge entered an order of summary judgment in favor of the respondents in a state court foreclosure proceeding. After losing in the state courts,[1] the petitioners filed their complaint in the Federal District Court alleging that respondents committed fraud and abuse of process in obtaining the state court summary judgment. The petitioners failed to set forth facts sufficient to state a claim for relief cognizable in the Federal District Court, despite being

[1]The state trial court's summary judgment was upheld by the Wisconsin Court of Appeals and a petition for review and a separate motion for reconsideration were both denied by The Wisconsin Supreme Court.

being given three opportunities to do so. The Federal District Court dismissed the petitioners' second amended complaint pursuant to Rule 12(6)(1), Fed. R. Civ. P., and the Court of Appeals affirmed in a well reasoned decision. The petitioners, having been defeated in the federal courts below, seek another hearing in this court. Certiorari is clearly not appropriate.

The petitioners attempt to convince this court that their case should be reviewed because an important question of federal law was decided when their alleged cause of action under 42 U.S.C. Sec. 1983 was rejected for failure to state a claim upon which relief could be granted.

Petitioners' interpretation of 42 U.S.C. Sec. 1983 is certainly novel. They first characterize private attorneys representing private litigants as 'state actors' on the theory that their professional conduct may be prescribed by rules of professional responsibility. They next determine that private attorneys appearing on behalf of private litigants in state court proceedings are 'acting under color of law' by

utilizing state rules of civil procedure to move for summary judgment. Finally, they conclude that the state court judge, who ruled in favor of the motion for summary judgment, is a 'co-conspirator.'

The United States Supreme Court has held that: "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. [citations omitted]. 'Special and important reasons' imply a reason to a problem beyond the academic or episodic.' Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed 897, 901 (1955).

The Court of Appeals below affirmed the application of Rule 12(b)(6), Fed. R. Civ. P. by the Federal District Court to the facts alleged in the petitioners' second amended complaint. Ordinarily, an application by a District Court of the Rules of Civil Procedure, when

affirmed by the Court of Appeals, will not be reviewed by the United States Supreme Court, particularly where the question is one that concerns the judgment of the District Judge in relation to a particular set of facts. Appalachian Power Co. vs. American Institute of Certified Public Accountants, 80 S. Ct. 16, 4 L. Ed. 2d 30, 32 (Per Brennan, J.) (1959). The petition for writ of certiorari should be denied.

CONCLUSION

The petitioners have not shown any special and important reasons for granting their petition for writ of certiorari pursuant to Rule 17.1(a), S. Ct. R. Civ. P. The issues raised are not of public importance or interest. The Federal District Court's application of the Federal Rules of Civil Procedure to the particular facts alleged in the petitioners' second amended complaint did not constitute a grave departure from the accepted and usual course of judicial proceedings. Petitioners' novel construction of 42 U.S.C. Sec. 1983, which would effectively open the door of the federal courthouse to every defeated state court litigant, may be of academic interest, but it does not raise a substantial question of federal law. Petitioners are defeated litigants seeking a rehearing of private grievances. Their petition for writ of

certiorari should be denied as inappropriately brought under Rule 17.1(a), Sup. Ct. R. Civ. P.

Respectfully submitted this 1st day of October, 1984.

GLINSKI, HAFERMAN, ILTEN,
MILLS & DREIER, S.C.

/s/ Gary L. Dreier

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APPENDIX

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

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4a Judgment of Feb. 24, 1983

5a Judgment of Apr. 8, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

* *

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

Plaintiffs,

-vs.-

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.,

Defendants.

MOTION TO DISMISS AMENDED COMPLAINT

CASE NO: 83-C-68S

* *

The defendants, ITT Consumer Financial Corporation and Aetna Finance Company (Thorp Finance Corporation), by their attorneys, Glinski, Haferman, Ilten, Mills & Dreier, S.C., by Gary L. Dreier, hereby move the Court as follows:

(1) For an Order dismissing the plaintiffs' Amended Complaint on the ground the Court lacks subject matter jurisdiction of this controversy as particularized below:

(a) The Court lacks subject matter jurisdiction under 28 U.S.C. §1331 in that instant controversy does not arise under the Constitution, laws or treaties of the United States.

(b) The Court lacks subject matter jurisdiction under 28 U.S.C. §1332 in that the instant controversy is not wholly between citizens of different states in that the defendant, Whyte and Hirschboeck, S.C., is a Wisconsin corporation organized and existing under and pursuant to the laws of the State of Wisconsin with its principal

office and place of business located in the State of Wisconsin and the defendant, Edward J. Heiser, Jr., is a citizen of the State of Wisconsin, the State of which the plaintiffs, and each of them, are also alleged to be citizens.

(c) The Court lacks subject matter jurisdiction under 28 U.S.C. §1343 in that the instant controversy does not involve the redress of any deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States, nor does the instant controversy involve any other action enumerated in said 28 U.S.C. §1343.

(2) For an Order dismissing the plaintiffs' Amended Complaint, including the first, second and third causes of action alleged therein, for failure to state a claim upon which relief can be granted.

Dated: February 18, 1983.

GLINSKI, HAFERMAN, ILTEN, MILLS & DREIER, S.C.

/s/ Gary L. Dreier

BY: GARY L. DREIER
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CIV 32
(7/83)

JUDGMENT ON DECISION BY THE COURT

DISTRICT NUMBER 10

FILED
FEB 24 1983
JOSEPH W. SKUPNIEWITZ, CLERK

DATE NUMBER

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

SCHULIST FARMS, INC., et al

Plaintiffs,

vs.

ITT CONSUMER FINANCIAL CORPORATION, et al

Defendants.

CIVIL ACTION FILE NO. 83-C-68

JUDGMENT

consideration
This action came on for ~~hearing~~ before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly ~~heard~~ considered and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion to dismiss is granted, without prejudice and with costs.

Dated at Madison, Wisconsin, this 24th day of February, 19 83.

Joseph W. Skupniewitz
Clerk of Court

Copy of this document has been provided to: Robert Wichmann
this 24th day of Feb 1983
By [illegible]
Deputy Clerk

BEST AVAILABLE COPY

CIV 32
(7/83)

JUDGMENT ON DECISION BY THE COURT

FILED 17
APR 6 1983
JOSEPH W. SKUPNIEWITZ, CLERK

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

CIVIL ACTION FILE NO. 83-C-68

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

vs.

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (Thorp Finance Corporation), WHYTE AND HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that this court's order dismissing the complaint in said matter on February 22, 1983, and that judgment entered thereon is RECONSIDERED and VACATED.

It is further ordered that plaintiffs are GRANTED their motion for leave to file second amended complaint.

It is further ordered and adjudged that defendants' motion to dismiss as it relates to plaintiffs' second amended complaint is GRANTED, with prejudice and without costs.

Dated at Madison, Wisconsin, this 6th day of April, 19 83.

JOSEPH W. SKUPNIEWITZ
Clerk of Court

By: [signature]

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